STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1366

State of Minnesota,
Appellant,

vs.

Jerad Michael Whitford,
Respondent.

Filed February 20, 2018
Reversed and remanded
Reilly, Judge

Morrison County District Court
File No. 49-CR-17-98

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Brian J. Middendorf, Morrison County Attorney, Todd L. Kosovich, Assistant County Attorney, Little Falls, Minnesota (for appellant)

Mark D. Nyvold, Fridley, Minnesota (for respondent)

Considered and decided by Reilly, Presiding Judge; Worke, Judge; and Rodenberg, Judge.

U N P U B L I S H E D O P I N I O N

REILLY, Judge

In this pretrial appeal, appellant State of Minnesota argues that the district court erred by granting respondent-defendant Jerad Michael Whitford's motion to dismiss a

third-degree murder charge for lack of probable cause. We agree and, therefore, reverse and remand.

FACTS

In January 2017, the State of Minnesota filed a criminal complaint against Whitford asserting a charge of third-degree murder for selling, giving away, or distributing a controlled substance classified as a schedule I or II substance, in violation of Minnesota Statutes section 609.195(b) (2014). The charges stem from an incident in which Whitford allegedly sold, gave away, or distributed heroin to Callie Statema, who in turn gave heroin to her boyfriend, T.S. T.S. died from complications of opiate toxicity. Heroin is a schedule I opioid drug. Minn. Stat. § 152.02, subd. 2(c)(11) (2014).

On June 14, 2016, Statema contacted Whitford to purchase heroin. Whitford arranged to purchase heroin from Jason "Jay" White and accompanied Statema and her friend, A.J.J., to Minneapolis to purchase the heroin. Statema gave money to Whitford to purchase the heroin. Whitford met with White and gave him Statema's money in exchange for three grams of heroin, which Whitford then handed to Statema. Statema gave Whitford and A.J.J. one-half of a gram of heroin in exchange for arranging the transaction. Whitford, Statema, and A.J.J. returned to Statema's home, and Statema shared the heroin with T.S. Later that evening, T.S. lost consciousness and Statema called the police. T.S. was transported to the hospital, where he was later pronounced dead from complications from opiate toxicity.

The state charged Whitford with third-degree murder. In May 2017, Whitford moved to dismiss the complaint for lack of probable cause. The issue of probable cause

was submitted to the district court based on the criminal complaint and the police report, without testimony. The district court determined that probable cause did not support the third-degree murder charge and dismissed the complaint, and the state now appeals.

D E C I S I O N

I. The district court's pretrial dismissal order is appealable.

The state's right to appeal in a criminal case is limited. The state may appeal a dismissal for lack of probable cause if the dismissal is "based on questions of law," Minn. R. Crim. P. 28.04, subd. 1(1), and if "the district court's alleged error, unless reversed, will have a critical impact on the outcome of the trial," *id*., subds. 1(1), 2(2)(b). We determine that both elements are satisfied and the district court's pretrial dismissal order is appealable.

The state may appeal as of right from "any pretrial order, including probable cause dismissal orders based on questions of law," whereas pretrial dismissals for lack of probable cause premised solely on factual determinations are not appealable. Minn. R. Crim. P. 28.04, subd. 1(1). "[W]hether the dismissal is based on a legal or a factual determination is a threshold jurisdictional question." *State v. Ciurleo*, 471 N.W.2d 119, 121 (Minn. App. 1991). Here, the material facts are undisputed and the district court's dismissal of the third-degree murder charge was based solely on the court's interpretation of Minnesota Statutes section 609.195(b). The interpretation and construction of a statute is a question of law. *State v. Kiminski*, 474 N.W.2d 385, 389 (Minn. App. 1991), *review denied* (Minn. Oct. 11, 1991). The appeal is therefore permissible under rule 28.04, subdivision 1(1).

The state further satisfies the critical-impact test, which requires the prosecuting authority to demonstrate "how the district court's alleged error, unless reversed, will have a critical impact on the outcome of the trial." *State v. Osorio*, 891 N.W.2d 620, 626-27 (Minn. 2017) (quoting Minn. R. Crim. P. 28.04, subd. 2(2)(b)). Dismissal of a complaint satisfies the critical-impact requirement because it impairs the state's ability to prosecute the charged offense. *State v. Trei*, 624 N.W.2d 595, 597 (Minn. App. 2001), *review dismissed* (Minn. June 22, 2001). Because the district court's dismissal of the charge precludes any trial in this case, the critical-impact test is satisfied and we therefore proceed to a review on the merits. *See State v. Lugo*, 887 N.W.2d 476, 481-86 (Minn. 2016) (permitting appellate review on the merits once critical impact is established).

II. The district court's pretrial dismissal order is erroneous.

We next consider whether the district court erred by concluding that probable cause does not support the criminal charge against Whitford. The primary function of a probable-cause hearing is to "screen[ ] out cases which, for one reason or another, ought not to be prosecuted" because the record as a whole contains an insufficient factual basis to support the offense charged. *State v. Florence*, 306 Minn. 442, 447 n.4, 453-54, 239 N.W.2d 892, 896-97 n.4, 900 (1976). On a challenge to a district court's pretrial probable-cause ruling, appellate courts review the factual findings for clear error but review the application of the probable-cause standard to the facts de novo. *State v. Lopez*, 778 N.W.2d 700, 703 (Minn. 2010). A charge should not be dismissed for lack of probable cause if there is a fact question on an element of the offense. *Id*. at 704.

The state charged Whitford with third-degree murder in violation of Minnesota Statutes section 609.195(b). A person is guilty of third-degree murder if that person, "without intent to cause death, proximately causes the death of a human being by, directly or indirectly, unlawfully selling, giving away, bartering, delivering, exchanging, distributing, or administering a controlled substance classified in Schedule I or II." Minn. Stat. § 609.195(b). The district court determined that Whitford's actions did not constitute "selling" or "giving away" within the meaning of section 609.195(b), and that Whitford did not proximately cause T.S.'s death. We determine that both of the district court's determinations are erroneous.

Selling or Giving Away a Controlled Substance

We begin by analyzing the statute "primarily on its plain language in an effort to discern and effectuate the legislature's intent." *State v. Shimota*, 875 N.W.2d 363, 366 (Minn. App. 2016), *review denied* (Minn. Apr. 27, 2016); *see also Thong v. State*, 892 N.W.2d 842, 846 (Minn. App. 2017) (stating principle that statute's plain language controls when meaning of statute is unambiguous), *review denied* (Minn. May 30, 2017). The transactions prohibited in section 609.195(b) include "selling, giving away, bartering, delivering, exchanging, distributing, or administering a controlled substance." Minn. Stat. § 609.195(b). "Selling" or "to sell" means "to give up (property) to another for money or other valuable consideration." *Barrow v. State*, 862 N.W.2d 686, 689 (Minn. 2015) (quotation omitted). "Give away" means "that the defendant must give up more than temporary control of the item at issue," and "deliver" means "to set free from restraint" or to "yield possession or control of." *Id*. at 690 (quotation omitted).

By its plain language, section 609.195(b) criminalizes the sale, giving away, delivery, exchange, or distribution of certain controlled substances when it proximately causes death. It is undisputed that Whitford gave money to White in exchange for three grams of heroin and then delivered the heroin from White to Statema. Given the plain language of the statute, we conclude that probable cause exists as to whether Whitford engaged in selling, giving away, and delivering heroin.

The district court determined that Whitford was not criminally liable because there was "no evidence" that he shared his quarter-gram portion of the heroin with T.S. or that his purchase of the drugs from White was "in any way a part of a continuing criminal enterprise or drug distribution." The district court premised its decision on *State v. Carithers*, which presented the certified question: "When a married couple jointly acquires a Schedule I controlled substance, and one of the partners uses that substance and subsequently dies from a drug overdose, did the legislature intend that the surviving partner be subject to prosecution under [section] 609.195(b)?" 490 N.W.2d 620, 620 (Minn. 1992). The supreme court answered the certified question in the negative, explaining that because each defendant acquired the heroin jointly with his or her spouse, "neither defendant can be convicted of the predicate felony of furnishing or transferring or delivering heroin to a spouse who already has constructive possession and therefore cannot be convicted . . . under section 609.195(b)." *Id*. at 623. The *Carithers* court reasoned that "the legislative enactment of section 609.195(b) was directed at the control of the commercial distribution

of controlled substances" and did not apply to the "joint acquisition and possession of drugs." *Id*. at 622, 624.

Our recent caselaw reaffirms the principle that "the holding in *Carithers* is narrow, and the existence of a marriage relationship is an important element in establishing joint acquisition and possession for purposes of a defense." *State v. Schnagl*, ___ N.W.2d ___, ___, 2017 WL 6418215, at *7 (Minn. App. Dec. 18, 2017) (citing *State v. Varner*, 643 N.W.2d 298, 300, 307 (Minn. 2002) (determining that an exchange of sexual favors for drugs constituted a sale and declining to apply *Carithers* because none of the parties involved were married); and *Barrow*, 862 N.W.2d at 687, 690 n.2 (distinguishing *Carithers* on the basis that, although Barrow gave drugs to his wife, the drugs had not been jointly acquired)). Here, there is no evidence that Statema and Whitford jointly acquired or possessed the heroin as a married couple or partners, and, therefore, *Carithers* is not persuasive authority. *See Carithers*, 490 N.W.2d at 622 (limiting holding to facts presented in certified question of married couple jointly acquiring drugs).

Moreover, the district court's determination that the state cannot charge Whitford with third-degree murder because "[t]he heroin that [T.S.] used was that which was purchased by Statema"—rather than Whitford's own quarter-gram portion of heroin—would render a portion of the statute meaningless. Section 609.195(b) articulates that a person may be guilty of third-degree murder if he proximately causes another's death by "directly or indirectly, unlawfully selling . . . , delivering, exchanging, distributing, or administering a controlled substance." Minn. Stat. § 609.195(b). "A statute should be interpreted, whenever possible, to give effect to all of its provisions, and no word, phrase,

or sentence should be deemed superfluous, void, or insignificant." *State v. Larivee*, 656 N.W.2d 226, 229 (Minn. 2003) (quotations omitted). To accept the district court's decision that Whitford cannot be held liable for T.S.'s death because T.S. used Statema's portion of the drug—rather than Whitford's portion of the drug—would effectively read the word "indirectly" out of the statute. Based on a plain reading, section 609.195(b) contemplates liability for an individual who acts as an intermediary and delivers a controlled substance to another individual, who in turn gives the drug to someone who later dies. We conclude that the district court erred by determining that Whitford cannot be held criminally liable for T.S.'s death because his conduct did not constitute "selling" or "giving away" drugs within the meaning of section 609.195(b).

Proximate Causation

In a homicide prosecution, the state must establish that "the act of defendant must have been the proximate cause of the death of [the victim] without the intervention of an efficient independent force in which defendant did not participate or which he could not reasonably have foreseen." *State v. Schaub*, 231 Minn. 512, 517, 44 N.W.2d 61, 64 (1950). While section 609.195(b) does not specifically define "proximate causation," causation in a homicide case is established by proof that the defendant's conduct was a "substantial causal factor" in bringing about the victim's death. *State v. Hofer*, 614 N.W.2d 734, 737 (Minn. App. 2000), *review denied* (Minn. Aug. 15, 2000); *see State v. Gatson*, 801 N.W.2d 134, 146 (Minn. 2011) (explaining that when "cause" is used in homicide statute, prosecution must prove that defendant's acts were a "substantial causal factor" resulting in death); *State v. Olson*, 435 N.W.2d 530, 531, 534 (Minn. 1989) ("To prove defendant guilty

of [second-degree murder and first-degree manslaughter], the state must prove the defendant's acts were a 'substantial causal factor' in causing the [victim's] death."); *State v. Sutherlin*, 396 N.W.2d 238, 239-41 (Minn. 1986) (sustaining first-degree murder conviction when state's evidence established that defendant's premeditated shooting "was a substantial causal factor in the deaths"); *see also State v. Nelson*, 806 N.W.2d 558, 562 (Minn. App. 2011) (explaining that in vehicular homicide case state must show defendant's conduct was a "substantial factor" in bringing about the death), *review denied* (Minn. Feb. 14, 2012); *State v. Jaworsky*, 505 N.W.2d 638, 643 (Minn. App. 1993) (holding that district court did not abuse its discretion by instructing jury that causation required a showing that defendant's conduct was a "substantial part in bringing about the death" in vehicular homicide case), *review denied* (Minn. Sept. 30, 1993).

The state argues that Whitford's actions proximately caused T.S.'s death because Whitford contacted White to arrange the heroin purchase, gave Statema's money to White in exchange for three grams of heroin, and handed the heroin to Statema. Whitford claims that, when he delivered the heroin to Statema, it was not reasonably foreseeable that Statema would later share the heroin with T.S. because she was "greedy" with drugs. But the district court also made a factual finding that "[T.S.] knew that Statema was driving to Minneapolis to buy heroin" and "sent as many as [10] text messages to Statema seeking to share some of the anticipated heroin when she returned [home]." There are factual questions outstanding regarding proximate causation, and proximate causation is a fact question for the jury unless reasonable minds can arrive at only one conclusion. *See State v. Smith*, 264 Minn. 307, 322, 119 N.W.2d 838, 849 (1962) (affirming homicide conviction

when issue of causation properly submitted to jury); *see also Jaworsky*, 505 N.W.2d at 643 (affirming conviction when question of causation submitted to jury); *State v. Olson*, 459 N.W.2d 711, 716 (Minn. App. 1990) (same), *review denied* (Minn. Oct. 25, 1990); *cf. State v. Smith*, 835 N.W.2d 1, 7 (Minn. 2013) (noting that existence of a superseding cause may be a jury question if the evidence is such that reasonable minds could differ).

A district court errs by dismissing a criminal complaint for lack of probable cause if there is a fact question on an element of the offense. *See Lopez*, 778 N.W.2d at 704. Here, there are fact questions regarding whether Whitford directly or indirectly participated in the selling or giving away of heroin and whether Whitford's participation was a proximate cause of T.S.'s death. Both are elements of the offense under section 609.195(b) and the district court erred by dismissing the charge for lack of probable cause. We therefore reverse the district court's pretrial dismissal order and remand for further proceedings.

Reversed and remanded.